Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82 - 1360

IN THE

Supreme Court of the United States

October Term, 1982

JOHN W. CROSS, JERRY J. DENEGALL and FRANK WILSON, individually and on behalf of all others similarly situated,

Petitioners,

v.

LLOYD BAXTER, HENRY KLAR, DONNIE TURNER, WESLEY BALL and SHERROD McCALL, individually and as members of the City council of Moultrie, Georgia; WILLIAM B. WITHERS, individually and as Mayor of the City of Moultrie, Georgia; MRS. RENNIE TUMLIN, individually and as Municipal Election Superintendent for the City of Moultrie, Georgia; W. E. KELLY, W. B. LINDER and E. W. RHODEN, JR., individually and as Municipal Election Managers for the City of Moultrie, Georgia; and their successors in office,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners take the position that both the District Court and the Court of Appeals failed to consider their §2 claim. With this we disagree. The amended §2 deals with result instead of intent.

The Court of Appeals in Cross I, ***Cross v. Baxter***, 604 F.2nd 875 (5th Cir. 1979), applying the criteria set out in ***Zimmer v. McKeithen***, 485 F.2nd 1297 (5th Cir. 1973), held that four specific areas of inquiry were particularly important, the second of such areas being "whether past discrimination has the present effect of discouraging minority members' participation in the electoral process". Pet. for cert. 15a, 16a. The Court of Appeals found "the purpose of inquiring into these areas is to determine whether an electoral system that is unobjectionable in the abstract, nevertheless, on the specific facts presented, has the effect of diluting the impact of a minority's voting power, and whether it is intended to have such an effect." Pet. for cert. 17a.

The Court of Appeals further held that the petitioners had introduced sufficient evidence of past discrimination to shift the burden to defendants to demonstrate that such past discrimination does not preclude present effective participation by blacks in Moultrie's electoral system, that the District Court had misplaced the burden of proof and that the District Court had reached conclusions without discussing substantial relevant contrary evidence to meet the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. The case was reversed and remanded with instructions for the District Court to reconsider on the basis of instructions in the opinion of the Court of Appeals.

It was then that the District Court held the further evidentiary hearing and made its findings of fact and conclusions of law. Part B of the supplemental opinion and order of the District Court dealt specifically with "effect of past discrimination on present participation in political process", Pet. for cert. 95a, and after discussing the evidence the District Court concluded "that past discrimination does not have a present effect of diluting the minority vote in the political process". Pet. for cert. 97a.

The Court of Appeals affirmed. ***Cross v. Baxter***, 639 F.2d 1383 (5th Cir. 1981).

After this Court's decision in ***Rogers v. Lodge***, _____ U.S. ____, 102 S. Ct. 3272 (1982), the Court of Appeals supplemented its holding and pointed out that "the trial court made extensive findings of fact and conclusions of law" after its remand, Pet. for cert. 9a. It found the findings of fact were not clearly erroneous, and that the trial court's conclusions of law were based upon its mandate and the authorities cited therein.

Petitioners improperly attempt here and attempted before the Court of Appeals to inject "legislative history" of 1982 amended §2 to prove a fact on appeal. Pet. for cert. 12-18. While legislative history is useful to determine legislative intent, it cannot replace or supplement evidence introduced in a trial court, for obvious reasons. In addition, the statement in the "legislative history" is an inaccurate statement of statements of the Court of Appeals in Cross I with regard to the inference of past previous discrimination and a history of pervasive discrimination. ***Cross v. Baxter***, supra 881, Pet. for cert. 18.

REASONS FOR DENYING WRIT

The trial court on remand considered the evidence of past discrimination and determined that it has no present effect on minority participation in the electoral process. Such is the basis of petitioners' §2 claim and the same has been decided against them under Rule 52(a). This petition is no more than an effort by petitioners to reargue the facts. The Court of Appeals correctly applied Rule 52(a) in that the findings of fact of the District Court were not clearly erroneous. See ***Pullman Standard v. Swint***, ***United States Steelworkers v. Swint***, 456 U.S. ____, 102 S. Ct. 1781 (1982).

The panel in the Court of Appeals which decided this case also decided ***Lodge v. Buxton***, 639 F.2nd 1358 (5th Cir. 1981) and the decisions are consistent.

CONCLUSION

Petitioners have had their constitutional and statutory claims carefully considered in the trial court, on remand after specific instructions from the Court of Appeals, and the case has been decided against them on the facts.

The District Court has determined that even under petitioners' interpretation of their §2 claim, respondents have carried the burden of proof, and the Court of Appeals has found the trial court's findings to be not clearly erroneous under Rule 52. This petition is no more than an effort by petitioners to have this Court again review their case on the facts. Such is clearly not within the purview of Rule 17 of this Court, and the petition for the writ of certiorari should be denied.

Respectfully submitted,

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